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Why Rent When You Can Own: How ReDigi, Apple, and Amazon Will Use the Cloud and the Digital First Sale Doctrine to Resell Music, E-Books, Games, and Movies

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**WHY RENT WHEN YOU CAN OWN?
HOW ReDigi, APPLE, AND AMAZON WILL USE THE CLOUD AND
THE DIGITAL FIRST SALE DOCTRINE TO RESELL MUSIC,
E-BOOKS, GAMES, AND MOVIES**

John T. Soma & Michael K. Kugler***

ReDigi is a cloud based internet company that facilitates the buying and reselling of pre-owned digital music. A recent ruling against ReDigi by the U.S. District Court for the Southern District of New York seemed to cast doubt upon its business model. This article analyzes the decision in Capitol Records, LLC v. ReDigi Inc. and a loophole, known as ReDigi 2.0, left open by the ruling that would still allow consumers to buy and sell "used" digital content exclusively in the cloud under the first sale doctrine. This could include not only the resale of music, but also e-books, games, and movies. It also reveals plans by Apple and Amazon to change the landscape of the sale of digital content by building their own cloud based resale markets predicated on the first sale doctrine and models similar to ReDigi 2.0. These efforts will be supported by each company's own patent or patent pending technology, including Apple's revolutionary new model for Digital Personal Property. The Article concludes by arguing that copyright holders should support these pioneering efforts rather than embrace streaming services, the worst of which, Grooveshark, has faced a barrage of lawsuits for infringement and failure to pay royalties while allowing users to upload and share copyrighted music in the cloud for free.

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I. INTRODUCTION

There is music in the cloud.¹ There are movies too. Video games, books, television—if it is not there yet, it soon will be. With music, there are several subscription services that allow users to access untold volumes of music for a monthly fee.² Once users terminate those subscriptions, they have essentially spent their money renting rather than owning digital content. For those who have purchased digital music, the issue is how to realize the monetary value of ownership of such digital content. This Article focuses on the current state of copyright law regarding the ownership and transferability of digital music and why, in the case of *Capitol Records, LLC v. ReDigi Inc.*,³ the court ruled that the defendant (ReDigi) engaged in infringing activities by facilitating the resale of “used” digital music files. It discusses why the court left the door open for ReDigi, as well as Amazon and Apple, to pioneer a digital first sale doctrine which allows for the resale of previously owned digital music, as well as more expensive content like e-books, videogames, and movies, using the cloud. This Article also argues that no matter the media purchased, the retail customer should have the same first sale rights, and that it is in the best interest of content distributors (like ReDigi, Apple, and Amazon), copyright holders (like Capitol Records), and consumers themselves, to create a digital first sale doctrine that is equitable for all parties. Part II of this Article reviews the current state of copyright law and related legal concepts. Part III analyzes the *ReDigi* ruling. Part IV explains why ReDigi’s latest business

¹ The National Institute of Standards and Technology has defined the cloud as: “a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction.” John Soma et al., *Chasing the Clouds Without Getting Drenched: A Call for Fair Practices in Cloud Computing Services*, 16 J. TECH. L. & POL’Y 193, 197 (2011).

² See, e.g., NAPSTER, <http://www.napster.com> (last visited Jan. 27, 2013); RHAPSODY, <http://www.rhapsody.com/start> (last visited Jan. 27, 2013); SPOTIFY, <http://www.spotify.com/us/> (last visited Jan. 27, 2013).

³ 934 F. Supp. 2d 640 (S.D.N.Y. 2013).

model, involving direct sales to the cloud, can succeed, how Amazon and Apple may follow and expand on ReDigi's business model, and why copyright holders should support these efforts to create a digital first sale doctrine.

II. DIGITAL CONTENT AND COPYRIGHT LAW: TERMS, CONCEPTS, AND CASES

The Copyright Act⁴ sets forth a series of exclusive rights held by a copyright holder.⁵ The rights most relevant to digital music include the right to reproduce or copy the protected work, the right to distribute copies of those works through sale, lease, rental, lending, or other transfer of ownership, and the right to perform or display the work publicly.⁶ Sound recordings are defined as one of several types of works covered by the Act.⁷ The Act distinguishes between sound recordings themselves and the objects in which the sound recordings are stored, such as phonorecords.⁸ Phonorecords are further defined as:

[M]aterial objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.⁹

The Act deems that something is "fixed" if it "is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."¹⁰

A. *The First Sale Doctrine*

The first sale doctrine, also known as the rule of exhaustion, initially arose out of *Bobbs-Merrill Co. v. Straus*.¹¹ In *Bobbs*, the

⁴ 17 U.S.C. §§ 101–1332 (2013).

⁵ *Id.* § 106.

⁶ *Id.*

⁷ *Id.* § 101.

⁸ *See id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ 210 U.S. 339 (1908).

issue was whether a copyright owner could prevent the subsequent sale of a book after its initial purchase.¹² The U.S. Supreme Court held that the copyright owner could not prevent such a subsequent sale after the “first sale” of a copyrighted work,¹³ hence the doctrine’s name. The essence of that decision is now codified in Section 109 of the Copyright Act,¹⁴ which provides that “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”¹⁵ The first sale doctrine has allowed the market in sales of used records, CDs, DVDs, and video games to flourish over the past few decades.¹⁶

B. *Shrink-wrap and Click-wrap Licensing*

Digital content copyright owners have sought to sidestep the first sale doctrine by providing their content to consumers under a license agreement.¹⁷ The license for the digital content typically “imposes restrictions on use, reproduction, transfer[,] and modification” on consumers, thus rendering the first sale doctrine ineffective.¹⁸ The terms of these licenses are frequently forced upon consumers through so-called “shrink-wrap” licenses.¹⁹ In the case of *ProCD, Inc. v. Zeidenberg*,²⁰ the defendant sought to use a piece of computer software in a manner which was not permitted by the license agreement issued by the copyright owner.²¹ The license terms were sealed in a box with the copyrighted material

¹² *Id.* at 350.

¹³ *Id.* at 350–51.

¹⁴ 17 U.S.C. § 109(a) (2013).

¹⁵ *Id.*

¹⁶ Victor F. Calaba, *Quibbles ‘N Bits: Making a Digital First Sale Doctrine Feasible*, 9 MICH. TELECOMM. & TECH. L. REV. 1, 4 (2002).

¹⁷ *Id.* at 9.

¹⁸ *Id.* at 9–10.

¹⁹ Shrink-wrap licenses get their name from the clear plastic wrap often surrounding software. The terms of the license are contained within the shrink-wrap. *See id.*

²⁰ 86 F.3d 1447 (7th Cir. 1996).

²¹ *Id.* at 1450.

using shrink-wrap.²² The court held that once the shrink-wrap was opened and the software retained (the software also stated the terms of the license), the terms of the license were accepted and enforceable.²³

The power of shrink-wrap licenses has been extended to sales of other digital content, including music, through so-called “click-wrap” licenses. With click-wrap licensing, consumers are required to click “yes” and accept all terms of the license, even ones restricting sale or transfer, before the digital content can be downloaded or installed.²⁴ The ability of a shrink-wrap license, or in this case a click-wrap license, to circumvent the first sale doctrine was established in the case of *Vernor v. Autodesk*.²⁵ In *Vernor*, Timothy Vernor attempted to resell used copies of AutoCad software that he had purchased from Cardwell/Thomas & Associates, Inc. (“CTA”), which had made the original purchase of the software from Autodesk.²⁶ Autodesk asserted that the sale to CTA was not actually a sale but rather a licensing of the software, the terms of which prohibited the transfer of the license to any other party.²⁷ The Ninth Circuit held that the terms of Autodesk’s click-wrap license could effectively prevent transfer or sale of the software and that the first sale doctrine did not apply.²⁸ Similarly, large distributors of digital music, such as Amazon, have placed license restrictions into their own click-wrap agreements in order to impose similar restrictions.²⁹

²² *Id.* at 1449.

²³ *Id.* at 1455.

²⁴ Calaba, *supra* note 16, at 10.

²⁵ 621 F.3d 1102 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 105 (2011). See generally Charles Lopresto, Note, *Gamestopped: Vernor v. Autodesk and the Future of Resale*, 21 CORNELL J.L. & PUB. POL’Y 227 (2011) (discussing the first sale doctrine).

²⁶ *Vernor*, 621 F.3d at 1103 (9th Cir. 2010).

²⁷ *Id.* at 1103–06.

²⁸ *Id.* at 1111.

²⁹ Amazon’s licensing agreement requires users, in part, to agree to the following terms:

You must comply with all applicable copyright and other laws in your use of the Music Content. Except as set forth in Section 2.1 above, you may not redistribute, transmit, assign, sell, broadcast, rent, share, lend,

In the wake of *Vernor*, many have assumed that the creation of a license in selling digital content is enough to destroy the power of the first sale doctrine because the holder of a mere license cannot transfer ownership to another.³⁰ However, this is not necessarily true.

First, although the term “license” is used in a digital agreement, the use of the term does not always create a license. Most courts examine the contract and its terms to determine whether an actual sale has taken place.³¹ Second, even if a license exists, the terms of that license may still allow consumers to sell or transfer the copyrighted material.³² The license itself is merely a contract and may allow for transfer, sublicensing, or other methods of sharing the copyrighted material with others.³³ Indeed, the entire business model of ReDigi, a company that resells digital music, is predicated on this concept.³⁴ Although not controlling in the United States, a ruling by the European Court of Justice held that Oracle could not prevent the resale of its software, even though customers had not purchased a physical copy of the program.³⁵ The court

modify, adapt, edit, license or otherwise transfer or use the Music Content. We do not grant you any synchronization, public performance, promotional use, commercial sale, resale, reproduction or distribution rights for the Music Content. As required by our Music Content providers, Music Content is available only to customers located in the United States.

Amazon MP3 Store: Terms of Use, AMAZON, <http://www.amazon.com/gp/help/customer/display.html?nodeId=200154280> (last visited Jan. 27, 2014).

³⁰ See RAYMOND T. NIMMER & JEFF DODD, *MODERN LICENSING LAW* § 2:37 (2012).

³¹ *Id.*

³² Calaba, *supra* note 16, at 10 (citing Pamela Samuelson, *Digital Media and The Changing Face of Intellectual Property Law*, 16 *RUTGERS COMPUTER & TECH. L.J.* 323, 324 (1990)).

³³ *Id.* at 10.

³⁴ See *infra* Part III.A.

³⁵ *UsedSoft GmbH v. Oracle Int’l Corp.*, Case No. C-128/11, 2012 EUR-Lex CELEX LEXIS 62011CJ0128 (July 3, 2012), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0128:EN:HTML>; see also Timothy B. Lee, *Top EU court upholds right to resell downloaded software*, *ARS TECHNICA* (July 3, 2012, 10:59 AM), <http://arstechnica.com/tech-policy/2012/07/top-eu-court-upholds-right-to-resell-downloaded-software/> (discussing the European Court of Justice’s decision).

sensibly concluded that otherwise “suppliers would merely have to call the contract a ‘license’ rather than a ‘sale’ in order to circumvent the rule of exhaustion [also known as the first sale doctrine] and divest it of all scope.”³⁶

C. *Time-shifting and the Fair Use Doctrine*

The fair use doctrine in copyright law is, as one legal observer puts it, “like unto a religious mystery.”³⁷ While the fair use doctrine is codified, the application is generally fact-specific. Fair use is determined using an analysis of four factors, which can be paraphrased as: (1) “the purpose and character of the use,” particularly whether it is for commercial or educational uses; (2) “the nature of the copyrighted work;” (3) the amount of the copyrighted work that is used; and (4) the effect the use will have on the market and the copyrighted work’s value.³⁸

One of the early fair use cases, *Sony Corp. of Am. v. Universal City Studios, Inc.*,³⁹ involved the question of whether the use of video recorders was an act of infringement or fair use.⁴⁰ While the recorders could undoubtedly be used to duplicate copyrighted works, the U.S. Supreme Court held that video recorders had another non-infringing use, specifically time-shifting, and that this was a fair use.⁴¹ Time-shifting in this case occurred when a user recorded television shows and then played them back at a later date and time.⁴² In *Recording Industry Ass’n of America v. Diamond Multimedia System, Inc.*,⁴³ the logic of *Sony* was applied to the copying of MP3 audio files from a computer to a portable music player.⁴⁴ The court held that this copying was a “paradigmatic

³⁶ *UsedSoft GmbH*, 2012 EUR-Lex CELEX LEXIS 62011CJ0128, at 49.

³⁷ Rick Sanders, *Copyright and Digital Content: A 40,000-Feet View*, AARON SANDERS L. BLOG (Aug. 10, 2011), <http://www.aaronsanderslaw.com/blog/copyright-and-digital-content-a-40000-feet-view>.

³⁸ 17 U.S.C. § 107 (2012).

³⁹ 464 U.S. 417 (1984).

⁴⁰ *Id.* at 419–22.

⁴¹ *Id.* at 456.

⁴² *Id.* at 458.

⁴³ 180 F.3d 1072 (9th Cir. 1999).

⁴⁴ *Id.* at 1079.

noncommercial personal use” and, therefore, not infringement.⁴⁵ The importance of time-shifting to the storage of digital content in the cloud is clear. Although the transfer of that music necessarily requires copying, the argument under fair use is that such copying is solely for the purpose of providing access, at another time and place, to content to which that the user already has a right.⁴⁶

D. Napster and Grokster: Vicarious Liability, Contributory Infringement, and Inducement

Fair use can protect some types of copying in some situations, but it does have limits. Some of those limits were established in *A&M Records, Inc. v. Napster, Inc.*⁴⁷ In *Napster*, the Recording Industry Association of America (“RIAA”) sued Napster for vicarious and contributory infringement.⁴⁸ Napster was facilitating the copying of copyrighted digital music from one computer to another, but neither verifying ownership nor insuring that access to the content was limited to the original owner.⁴⁹ Napster was not storing the music files, but was providing a list of music files contained on other computers that users could access in order to copy them.⁵⁰

Napster argued, among other things, that this copying was another form of time-shifting.⁵¹ The court rejected this argument, holding that comparisons to *Sony* and *Diamond* were “inapposite because the methods of shifting in these cases did not also simultaneously involve distribution of the copyrighted material to

⁴⁵ *Id.*

⁴⁶ This argument that uploading to and downloading music using the cloud was a “quintessential fair use” was advanced by a defense attorney during oral arguments in a lawsuit alleging copyright infringement activities by ReDigi, a provider of cloud-based music streaming and sales. Transcript of Oral Argument at 13, *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013) (1:12-CV-00095-RJS), available at <http://www.scribd.com/doc/85183024/33/MR-BECKERMAN-The-uploading-and-downloading-are>.

⁴⁷ 239 F.3d 1004 (9th Cir. 2001).

⁴⁸ *Id.* at 1010–13.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1012.

⁵¹ *Id.* at 1019.

the general public; the time or space-shifting of copyrighted material exposed the material only to the original user.”⁵²

Napster established an important principle related to storage of music in the cloud. The ability to time-shift, and to move copyrighted content from one location to another via copying in order to do so, is likely permissible as a fair use under *Sony* and *Diamond*. Yet if that content is made accessible to the public at large, without regard to whether those members of the public own or have a license for that content, this will be seen as a violation of copyright law under *Napster*.⁵³

Napster was also important because it established the precedent, if only in the Ninth Circuit, that a company may be held liable for contributory infringement and vicarious liability for facilitating the transfer of music files using the internet.⁵⁴ *Napster* was vicariously liable because it benefitted directly from the infringement (the infringing material “act[ed] as a ‘draw’ for customers”⁵⁵) and it was in a position to stop the infringement.⁵⁶ It also contributed to the infringement because it had knowledge that its users were infringing, and it materially contributed to the infringement by providing servers to facilitate the copying of files.⁵⁷

Similarly, the subsequent case of *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*⁵⁸ affirmed that companies may be held liable for inducing copyright infringement as well.⁵⁹ In *Grokster*, a company by the same name was distributing a computer program that would allow users to access and copy music files stored on the computers of other users.⁶⁰ The Court held that “one who distributes a device with the object of promoting its

⁵² *Id.*

⁵³ *See id.*

⁵⁴ *Id.* at 1019–24.

⁵⁵ *Id.* at 1024 (quoting *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 263 (9th Cir. 1996)).

⁵⁶ *Id.* at 1023–24.

⁵⁷ *Id.* at 1020–22.

⁵⁸ 545 U.S. 913 (2005).

⁵⁹ *Id.* at 936–37.

⁶⁰ *Id.* at 919–22.

use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”⁶¹ The Court qualified this by adding that “mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability.”⁶² Rather, liability is premised on “purposeful, culpable expression and conduct.”⁶³

E. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*

*Cartoon Network LP, LLLP v. CSC Holdings, Inc.*⁶⁴ is a landmark case both in terms of liability for direct infringement and for cloud based services. In *Cartoon Network*, a cable company, Cablevision, was recording copyrighted television shows at the request of its subscribers, storing them remotely, and then later playing them back to their subscribers upon demand.⁶⁵ The court held that even if copyright infringement was taking place, Cablevision was not directly liable for infringement because the customer, rather than the company, was directing the server to playback the content.⁶⁶

The parallels to companies providing services that allow users to store digital content remotely in the cloud and download, or even stream, that digital content later are clear. *Cartoon Network* was a victory for companies looking to use the cloud in a similar way. It is important to note that *Cartoon Network* never addressed the question of whether storing then downloading cloud content amounted to some type of fair use.⁶⁷ Still, the fact that the Supreme Court denied certiorari could indicate that *Cartoon Network* is good law.⁶⁸

⁶¹ *Id.* at 936–37.

⁶² *Id.* at 937.

⁶³ *Id.* at 936–37.

⁶⁴ 536 F.3d 121 (2d Cir. 2008).

⁶⁵ *Id.* at 124.

⁶⁶ *Id.* at 133.

⁶⁷ *Id.* at 124.

⁶⁸ Timothy B. Lee, *Unlicensed: Are Google Music and Amazon Cloud Player illegal?*, *A Lost Decade*, ARS TECHNICA (July 4, 2011, 7:00 EDT), <http://arstechnica.com/tech-policy/2011/07/are-google-music-and-amazon-cloud-player-illegal/>.

III. *CAPITOL RECORDS, LLC v. REDIGI INC.*

Although the first sale doctrine is well established with respect to physical content such as books, CDs, and DVDs, its applicability to digital content is in dispute. ReDigi's business model of reselling digital content is built upon several of the legal principles outlined above, and *Capitol Records, LLC v. ReDigi Inc.*⁶⁹ is one of the critical first battles in the war to establish a digital first sale doctrine. The terms of use for digital music purchased from Apple's iTunes service initially forbade users from transferring the license of a downloaded music file and, in essence, reselling it.⁷⁰ However, the current terms of use are silent as to this restriction, thus clearing the way for ReDigi to facilitate the sale of previously owned music files purchased through iTunes.⁷¹ One of ReDigi's remaining problems though, and a key issue in the case, was whether its service facilitates the transfer of digital content from one location to another (or from one owner to another) without violating the Copyright Act.

A. *Background*

ReDigi is a cloud based internet company that bills itself as the "world's first pre-owned digital marketplace."⁷² In other words, ReDigi facilitates the sale of used digital music from one user to another.⁷³ With most online sales of digital music (for example, purchases through Amazon), copyright holders limit buyers to merely purchasing a nontransferable license through a click-wrap agreement.⁷⁴ ReDigi maintains that it does not allow sales of digital

⁶⁹ 934 F. Supp. 2d 640 (S.D.N.Y. 2013) (No. 12 Civ. 95).

⁷⁰ Rick Sanders, *ReDigi Finale: Comparing Apples to Amazons* (Part 20 in *Our Online Music Services Series*), AARON SANDERS PLLC (Dec. 2, 2011), <http://www.aaronsanderslaw.com/blog/redigi-finale-comparing-apples-to-amazons-part-20-in-our-online-music-services-series> [hereinafter *Comparing Apples*].

⁷¹ *Id.*

⁷² REDIGI, <https://www.redigi.com> (last visited Apr. 4, 2013).

⁷³ REDIGI HELP CENTER, <https://www.redigi.com/site/shop-help.html> (last visited Apr. 4, 2013).

⁷⁴ *Comparing Apples*, *supra* note 70 (citing Amazon's licensing terms for sales of digital music which provide that, "you agree that you will not redistribute, transmit, assign, sell, broadcast, rent, share, lend, modify, adapt, edit, license or otherwise transfer or use the Digital Content. You are not granted any

music purchased through Amazon, or other online retailers, to be sold on its website,⁷⁵ presumably because of this click-wrap license restriction. By contrast, ReDigi does allow resale of music purchased from iTunes, which sells its music without these restrictions.⁷⁶ The implication then, and clearly one that ReDigi relied on, is that music sold through iTunes is freely transferrable.⁷⁷

In order for music to be eligible for resale on ReDigi, it must have been purchased from iTunes or through ReDigi.⁷⁸ ReDigi does not allow uploading or sales of digital music ripped (copied) directly from a CD or obtained through file sharing.⁷⁹ Users must download and install ReDigi's Marketplace App, which scans the user's computer for music that is eligible to be stored in their cloud and resold.⁸⁰ Then users can upload their eligible music to ReDigi's cloud, list any songs they wish to sell, and purchase songs from others who have stored their music in the cloud.⁸¹ The

synchronization, public performance, promotional use, commercial sale, resale, reproduction or distribution rights for the Digital Content”).

⁷⁵ Answer at 45, *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640 (S.D.N.Y. Jan. 19, 2012) (No. 12 Civ. 95), *available at* http://beckermanlegal.com/Lawyer_Copyright_Internet_Law/capitol_redigi_120119Answer.pdf (asserting that “[t]he terms and conditions used by iTunes do not in any way prohibit any part of ReDigi’s business model. Plaintiff’s citation of the terms and conditions used by Amazon.com is inapposite”); *see also* Matthew Lasar, *Selling used iTunes tracks? ReDigi insists it’s legal*, ARS TECHNICA (Jan. 22, 2012, 6:00 PM), <http://arstechnica.com/tech-policy/2012/01/used-digital-music-file-seller-no-copying-here-almost/>.

⁷⁶ Rick Sanders, *ReDigi: A Digital Secondary Market (Part 15 of Our Online Music Services Series)*, AARON SANDERS PLLC (Oct. 19, 2011), <http://www.aaronsanderslaw.com/blog/redigi-a-digital-secondary-market-part-15-of-our-online-music-services-series> [hereinafter *Digital Market*] (discussing the lack of explicit language in Apple’s iTunes End User License Agreement).

⁷⁷ *See id.* (discussing ReDigi’s legal strategy using iTunes); *see also* REDIGI, <https://www.redigi.com/legal> (last visited Oct. 27, 2012).

⁷⁸ *ReDigi*, 934 F. Supp. 2d at 645.

⁷⁹ *See Digital Market*, *supra* note 76 (discussing the lack of explicit language in Apple’s iTunes End User License Agreement).

⁸⁰ *Id.* While ReDigi refers to this software as “ReDigi’s Marketplace App” on its website, the court refers to this software as Media Manager, citing ReDigi’s own filing in the case. *ReDigi*, 934 F. Supp. 2d at 645.

⁸¹ *Help Center*, REDIGI, <https://www.redigi.com/site/shop-help.html> (last visited Apr. 4, 2013).

sales process itself involves ReDigi transferring ownership of the music stored in its cloud from one owner to another without making any copies.⁸² The service then requires erasure of any copy held on the seller's computer or other connected devices.⁸³ The software does not automatically delete copies held on the seller's computer, but rather, if it detects copies on connected devices, requires that they be deleted in order to avoid suspension of the user's account.⁸⁴ The buyer can then either stream purchased music directly from the cloud, or download an identical copy to the new owner's computer.⁸⁵ ReDigi claims that Apple's digital music should be treated just like any other copyrighted work, and that once sold, it should be freely transferrable in a manner similar to that of a used CD.⁸⁶

In November 2011, the Recording Industry Association of America sent a letter to ReDigi demanding a halt to alleged copyright infringement (copying files, during transfers to and from ReDigi's cloud, with the express purpose of facilitating the sale of unauthorized copies).⁸⁷ In light of ReDigi's failure to comply, Capitol Records filed a lawsuit in January 2012 in the U.S. District Court for the Southern District of New York.⁸⁸ The complaint claimed copyright infringement, including vicarious liability and contributory infringement, as in *Napster*, as well as inducement, as in *Grokster*.⁸⁹

In *ReDigi*, the court recognized that the sale of a used CD is acceptable under the first sale doctrine because the CD itself is the original "material object" in which "a work is fixed," and the CD

⁸² Letter from Morlan Ty Rogers, Attorney for ReDigi, to Richard J. Sullivan, S.D.N.Y. Judge (Jan. 19, 2012), *available at* http://beckermanlegal.com/Lawyer_Copyright_Internet_Law/capitol_redigi_110119MTRToCourtSummJudgePreConLetter.pdf; *see also ReDigi*, 934 F. Supp. 2d at 645–46 [hereinafter *Rogers Letter*].

⁸³ *Rogers Letter*, *supra* note 82; *see also ReDigi*, 934 F. Supp. 2d at 645–46.

⁸⁴ *ReDigi*, 934 F. Supp. 2d at 645.

⁸⁵ *Rogers Letter*, *supra* note 82.

⁸⁶ *See Legal*, REDIGI, <https://www.redigi.com/legal> (last visited Apr. 4, 2013).

⁸⁷ Lasar, *supra* note 75.

⁸⁸ Complaint, Capitol Records, LLC v. ReDigi Inc., 934 F. Supp. 2d 640 (S.D.N.Y. Jan. 6, 2012) (No. 12 Civ. 95).

⁸⁹ *Id.* at 3.

is transferred at the point of sale. Capitol Records argued transfers by ReDigi necessarily involve making a copy, not only when the seller uploads the digital file to the ReDigi cloud, but also when the purchaser downloads the song to their computer.⁹⁰ ReDigi countered that argument by claiming to have pioneered new technology that actually transfers or “migrates” the original file itself, bit by bit, rather than making a copy in a new location and then deleting the original.⁹¹ As a separate issue, Capitol also alleged that ReDigi had “infringed its copyrights by streaming thirty-second song clips and exhibiting album cover art to potential buyers,” although ReDigi countered that these actions were covered by a license agreement in place at the time.⁹²

B. *Decision*

On the issue of “whether a digital music file, lawfully made and purchased, may be resold by its owner through ReDigi under the first sale doctrine,” the court held that it cannot.⁹³ Accordingly, ReDigi was found liable for direct, vicarious, and contributory infringement of Capitol’s distribution and reproduction rights.⁹⁴ The court declined to reach the issue of inducement.⁹⁵ Because issues of fact remained as to whether a valid license agreement

⁹⁰ Plaintiff’s Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment at 3–7, *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013) (No. 12 Civ. 95).

⁹¹ *Id.*

⁹² *ReDigi*, 934 F. Supp. 2d at 652.

⁹³ *Id.* at 648.

⁹⁴ *Id.* at 660.

⁹⁵ In a footnote, the court pointed to a discrepancy between whether inducement represented a distinct and separate form of liability, or whether it was part of contributory liability, but concluded that because ReDigi “is liable for contributing to its users’ direct infringement of Capitol’s copyrights, it does not reach Capitol’s inducement claim.” *Id.* at 660 n.9. Apparently agreeing with the latter interpretation, the court declined to address the question of inducement because it had already found ReDigi liable for contributory infringement. *Id.* This explanation seems to indicate that the court does not view inducement as a separate cause of action, but rather only one of several ways of satisfying the elements of contributory infringement.

existed that would allow ReDigi to display album images or stream thirty-second clips, summary judgment was denied on that issue.⁹⁶

1. *Reproduction Right*

The court began its analysis with the issue of whether or not the music files uploaded to ReDigi's cloud were the original files or merely duplications.⁹⁷ It concluded that the legislative history and "the plain text of the Copyright Act make[] clear that reproduction occurs when a copyrighted work is fixed in a new *material object*."⁹⁸ Citing *London-Sire Records, Inc. v. John Doe I*,⁹⁹ the court found that the music file itself was a distinct entity, separate from the material object it was fixed in.¹⁰⁰ Regardless of whether that material object is a phono-record or a hard drive, the copyright holder's reproduction right is infringed upon when the music file is fixed into that new material object, distinct from the original phono-record or hard drive.¹⁰¹

This analysis neatly dispatched ReDigi's argument that it had somehow migrated or transported the original file rather than making a copy. ReDigi pointed to *C.M. Paula Co. v. Logan*¹⁰² as a case in which copyrighted material (a printed image) was moved from one location (a gift card) to another (a plaque) without infringing on the right of duplication. In oral argument, ReDigi tried to liken its process to the transporter in *Star Trek* episodes which enabled Captain Kirk to be beamed to the planet's surface by Scotty, or to the molecular transferal of chocolate through *Wonkavision*.¹⁰³ These analogies were dismissed by the court because, even if true, the music file would still need to be fixed into a new material object (the hard drive on ReDigi's server) once it had been transported from the seller's computer, with an additional duplication taking place if a purchaser downloaded a file

⁹⁶ *Id.* at 652.

⁹⁷ *Id.* at 648.

⁹⁸ *Id.*

⁹⁹ 542 F. Supp. 2d 153 (D. Mass. 2008).

¹⁰⁰ *ReDigi*, 934 F. Supp. 2d at 648–51.

¹⁰¹ *Id.* at 649.

¹⁰² *Id.* at 650 (citing *C.M. Paula Co. v. Logan*, 355 F. Supp. 189 (N.D. Tex. 1973)).

¹⁰³ *Id.* at 650 n.2.

from the cloud.¹⁰⁴ In the court's view, whether or not the "original" file still existed was immaterial to its analysis.¹⁰⁵

2. *Distribution Right (Fair Use and First Sale Doctrine)*

Turning to the distribution right, the court rejected ReDigi's argument that sales of Capitol's music were protected by fair use.¹⁰⁶ ReDigi argued that users could upload music to the cloud, as well as download it, under fair use.¹⁰⁷ While Capitol did not contest that notion, it objected to this use *incident to sale*, and the court agreed.¹⁰⁸ In reaching this conclusion, the court analyzed the four fair use factors.¹⁰⁹ It found that the purpose/character of the use was clearly commercial (selling music);¹¹⁰ the nature of the work as a sound recording was "close to the core of the intended copyright protection;"¹¹¹ the portion being copied represented the entirety of the work;¹¹² and the impact on the market for (or value of) the work would be significant, given that ReDigi offers an identical copy for a lower price.¹¹³

Likewise, the court rejected ReDigi's argument that the first sale doctrine, which allows purchasers of copyrighted content to resell it,¹¹⁴ applied to sales of previously owned music files.¹¹⁵ In order to qualify for protection under the first sale doctrine, the item being sold must be "lawfully made under [17 U.S.C. § 109]."¹¹⁶ The court, however, concluded that transferal of music files to ReDigi's server represented an infringement upon Capitol's reproduction right; the court further concluded that those files were

¹⁰⁴ *Id.* at 650.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 652–54.

¹⁰⁷ *Id.* at 653.

¹⁰⁸ *Id.* (emphasis in original) (citing *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 124 (2d Cir. 2010)).

¹⁰⁹ See *supra* Part II.E for a detailed discussion of the fair use factors.

¹¹⁰ *ReDigi*, 934 F. Supp. 2d at 653.

¹¹¹ *Id.* at 654 (quoting *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (internal quotation marks omitted)).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See *supra* Part II.B for a detailed discussion of the first sale doctrine.

¹¹⁵ *ReDigi*, 934 F. Supp. 2d at 654–56.

¹¹⁶ *Id.* at 655 (quoting 17 U.S.C. § 109(a) (2006)).

not lawfully made and, therefore, did not qualify for protection under the first sale doctrine.¹¹⁷ Moreover, the first sale doctrine only protects resale by “the owner of a *particular* copy or phonorecord . . . of *that* copy or phonorecord.”¹¹⁸ The court reasoned that because a new copy was made once a file was uploaded and fixed onto the hard drive of ReDigi’s server, the first sale doctrine, which only protects sales of originals, did not apply.¹¹⁹ Indeed, the court likened this to trying to sell a cassette created by recording music played on a phonograph.¹²⁰ Although ReDigi mounted several policy arguments in favor of allowing a digital first sale doctrine, the court rejected them, pointing out that the statute is not ambiguous on this issue and that any change must come from Congress rather than the courts.¹²¹

3. *Direct, Contributory, and Vicarious Infringement*

The court found ReDigi liable for direct infringement because the defendant had “‘engaged in some volitional conduct sufficient to show that [it] actively’ violated one of the plaintiff’s exclusive rights.”¹²² While the court acknowledged the Second Circuit’s holding in *Cartoon Network*, excusing a company from liability when its customers used its equipment for infringing activity, the court also pointed to an exception created in *Cartoon Network* that *would* find a company liable if its “contribution to the creation of an infringing copy [is] so great that it warrants holding that party directly liable for the infringement, even though another party has actually made the copy.”¹²³ This rare exception, the court explained, applied to ReDigi because the company not only infringed the distribution right, but the reproduction right as well.¹²⁴ Moreover, ReDigi qualified for liability under this exception because its

¹¹⁷ *Id.*

¹¹⁸ *Id.* (quoting 17 U.S.C. § 109(a) (2006)).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 655–56.

¹²² *Id.* at 656–57 (quoting *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 148 (S.D.N.Y. 2009)).

¹²³ *Id.* at 657 (quoting *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121, 133 (2d Cir. 2008)).

¹²⁴ *Id.*

software was designed to be used exclusively with copyrighted material and served no other purpose.¹²⁵

ReDigi was also found liable for contributory infringement because “ReDigi knew or should have known that its service would encourage infringement.”¹²⁶ The court pointed to ReDigi’s warnings to its investors, as well as to the cease-and-desist letter sent from RIAA.¹²⁷ It also declined to create a “good faith” defense based on ReDigi’s claims of reliance upon advice from attorneys and other record companies.¹²⁸ The court found that, as in *Napster*, ReDigi had provided the facilities for the infringing activity and that, unlike the video-recorders in *Sony*, ReDigi’s service had no non-infringing uses.¹²⁹ ReDigi, therefore, could not escape liability for contributory infringement.

The court concluded by finding ReDigi liable for vicarious infringement as well, because ReDigi controlled its own website and financially benefitted from each sale.¹³⁰ The court declined to comment on the legality of ReDigi’s new business model, dubbed ReDigi 2.0, involving a different mechanism for effectuating resale of digital music.¹³¹ ReDigi has indicated it plans to appeal the court’s ruling and keep running its ReDigi 2.0 service.¹³²

IV. ANALYSIS

The *ReDigi* case is undoubtedly a setback for a digital first sale doctrine, and the court’s ruling raises some questions about the

¹²⁵ *Id.* (effectively relying on *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005)).

¹²⁶ *Id.* at 658.

¹²⁷ *Id.* at 658–59.

¹²⁸ *Id.*

¹²⁹ *Id.* at 657.

¹³⁰ *Id.* at 660.

¹³¹ *Id.* at 646 n.3. The court declined to consider ReDigi 2.0 because it was “launched after Capitol filed the Complaint and mere days before the close of discovery[.]” *Id.* Part VI.B, *infra*, contains a detailed analysis of ReDigi 2.0 and its viability in light of the Court’s ruling.

¹³² Don Jeffrey, *Vivendi Wins Copyright Ruling in Used-Digital-Song Case*, BLOOMBERG BUSINESSWEEK (Apr. 1 2013), <http://www.businessweek.com/news/2013-04-01/vivendi-wins-copyright-ruling-in-used-digital-song-case>.

interpretation of fair use, as well as the ruling in *Cartoon Network*. The ruling still leaves the door open for the resale of music that is transferred directly to the cloud upon first purchase, as in the case of ReDigi 2.0. Apple and Amazon are already maneuvering to push their own resale of digital music, as well as other digital content, using not only the ReDigi 2.0 model, but another more radical approach involving digital personal property (“DPP”).¹³³ It is in the best interest of copyright holders to embrace those efforts in order to realize some amount of profit, rather than pushing users towards alternatives that offer little or no compensation, such as Grooveshark or piracy.

A. *The Court’s Interpretation of Cartoon Network*

In finding ReDigi liable for direct infringement, the court found ReDigi was not protected under the *Cartoon Network* analysis because ReDigi’s “contribution to the creation of an infringing copy [was] so great that it warrants holding that party directly liable for the infringement, even though another party [had] actually made the copy.”¹³⁴ The court’s rationale was that the act of programming software to find copyrighted content satisfied the volitional element, and that this was distinguishable from the cable company’s equipment in *Cartoon Network*, which recorded not just copyrighted material, but also unprotected material on public television.¹³⁵ This implies that ReDigi could be absolved of liability if it redesigned its software to allow for the selection and uploading of non-copyrighted music as well.

The court also distinguished ReDigi’s situation from *Cartoon Network* because “ReDigi infringed both Capitol’s reproduction and distribution rights.”¹³⁶ But this reasoning ignores the facts of *Cartoon Network* where the cable company was also sued for infringing reproduction and distribution rights.¹³⁷ It also runs

¹³³ See *infra* Part VI.C.

¹³⁴ *ReDigi*, 659 F. Supp. 2d at 657 (quoting *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 133 (2d Cir. 2008)).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Cartoon Network*, 536 F.3d at 139–40.

counter to a ruling in *WNET, Thirteen v. Aereo, Inc.*,¹³⁸ recently issued by the Second Circuit, where the internet company Aereo was held *not* to be liable for copyright infringement, even though its entire business model was predicated on facilitating the copying and transmission of broadcast television.¹³⁹ While the court pointed out that ReDigi's infringement is connected with sales, unlike the defendant in *Cartoon Network*, it did not clearly articulate why this differentiates ReDigi's actions from that of the cable company.¹⁴⁰ In both instances, the companies provided and profited from the infrastructure, although it was the users who were directly infringing.

While ReDigi can no doubt argue these issues on appeal, a more promising approach is available to ReDigi, a fact the company seemed to acknowledge when it responded to the ruling: "We are disappointed in Judge Sullivan's ruling regarding ReDigi's 1.0 service technology. For those who are unaware, ReDigi 1.0 was the original beta launch technology, which has been superseded by ReDigi 2.0."¹⁴¹ This raises the inevitable question of whether ReDigi 2.0 could pass muster under Judge Sullivan's ruling.

B. *ReDigi 2.0*

In its brief to the court, ReDigi argued that even if its business model involving users uploading songs was found to be infringing, its new business model, dubbed ReDigi 2.0, does *not* infringe.¹⁴² This new model "allows users to download their iTunes purchases directly to the Cloud Locker and, in this regard, the first instance of

¹³⁸ 712 F.3d 676 (2d Cir. 2013).

¹³⁹ See *id.* at 696. In *Aereo*, the court relied on *Cartoon Network*, also known as *Cablevision*, in order to absolve Aereo of copyright infringement. *Id.*

¹⁴⁰ *ReDigi*, 934 F. Supp. 2d at 653–54.

¹⁴¹ Matt Peckham, *The Double Standard in the Room: ReDigi and the (Now Illegal) Resale of MP3s*, TIMETECH (Apr. 2, 2013), <http://techland.time.com/2013/04/02/the-double-standard-in-the-room-redigi-and-the-now-illegal-resale-of-mp3s/>.

¹⁴² See Memorandum of Law in Further Support of ReDigi's Summary Judgment Motion at 7–9, *ReDigi*, 934 F. Supp. 2d 640 (1:12-cv-00095-RJS, No. 90).

an Eligible File is in the Cloud Locker.”¹⁴³ Although the court declined to consider ReDigi 2.0’s legality,¹⁴⁴ nothing in Judge Sullivan’s ruling indicates that the model, as described, would violate copyright law.

The problem for ReDigi 1.0 was that the court found the copyright holder’s reproduction right infringed upon when the music file was fixed into a new material object.¹⁴⁵ While ReDigi attempted to argue that it somehow “transports” the material object itself, and then affixes it elsewhere, as in *C.M. Paula*, an appeals court is no more likely to buy that argument than Judge Sullivan was. But ReDigi 2.0 avoids that problem entirely.

The first sale doctrine provides that “the owner of a particular copy or phonorecord lawfully made under this title . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”¹⁴⁶ With ReDigi 2.0, the copy on ReDigi’s server *would* be lawfully made because iTunes would place the file directly into the cloud pursuant to an agreement with the copyright holder, just as happens when users purchase files directly on their computer or mobile device. Once a file is in ReDigi’s cloud, the file does not have to be migrated, transported, or even copied in order for it to be resold. ReDigi can simply transfer the license to access the file from the seller to the purchaser. The file will always exist in the same material object. Indeed, Judge Sullivan indicated that digital works are not excluded from the first sale doctrine, and that it would still protect the sale of a particular phonorecord.¹⁴⁷ In this case, the phonorecord would be a hard drive, and the sale would merely involve the transfer of a license to access it. While click-wrap licensing has prevented the transfer of licenses to other digital content in the past,¹⁴⁸ the terms of use from iTunes make no such prohibitions.¹⁴⁹ Likewise, the recent European Court of Justice

¹⁴³ *Id.* at 7.

¹⁴⁴ *ReDigi*, 934 F. Supp. 2d at 646 n.3.

¹⁴⁵ *Id.* at 649–50.

¹⁴⁶ 17 U.S.C. § 109(a) (2012).

¹⁴⁷ *ReDigi*, 934 F. Supp. 2d at 656.

¹⁴⁸ *See supra* Part II.B.

¹⁴⁹ *Comparing Apples*, *supra* note 70.

ruling rejecting licensing restrictions on software seems to open the door for these sales in Europe as well.¹⁵⁰ Therefore, a limited digital first sale doctrine could flourish.

The problem, though, is that users invariably do not want to simply access their files in the cloud. They also want them on their computers or on their mobile devices. This raises the question of whether users, having legally purchased a song that was directly downloaded to the cloud, could then download a copy onto their own computer. ReDigi has argued, and Capitol has disputed, that this would be covered by fair use.¹⁵¹

Although the details of ReDigi's position on this issue were redacted in public documents,¹⁵² its likely argument is that Capitol itself has not challenged the fair use of uploading to the cloud, or downloading from it, for personal use.¹⁵³ ReDigi could further argue that with ReDigi 2.0, the original copy remains on the server, and that any transfer of license involves selling the original file, which is still fixed in the original material object (the cloud server).¹⁵⁴ Capitol would likely counter that it only objects to uploading and downloading from the cloud when it is done *incident to sale*.¹⁵⁵ While the court in *ReDigi* agreed with that

¹⁵⁰ See *supra* Part II.B.

¹⁵¹ See Memorandum of Law in Further Support of ReDigi's Summary Judgment Motion at 7, *ReDigi*, 934 F. Supp. 2d 640 (1:12-cv-00095-RJS, No. 90).

¹⁵² See *id.*

¹⁵³ See *ReDigi*, 943 F. Supp. 2d at 653 ("ReDigi obliquely argues that uploading to and downloading from the Cloud Locker for storage and personal use are protected fair use. Significantly, Capitol does not contest that claim.").

¹⁵⁴ ReDigi discusses this process in vague terms on its website with this statement: "If you list that song for sale on the Marketplace and someone purchases it, the song and its corresponding license is instantaneously removed from your Cloud and transferred to the buyer, who then becomes its new owner. This is called an Atomic Transaction. No copies are made during this process." *ReDigi Frequently Asked Questions*, REDIGI.COM, <http://newsroom.redigi.com/faq/> (last visited Apr. 14, 2013).

¹⁵⁵ See *ReDigi*, 943 F. Supp. 2d at 653 ("Capitol does not contest that claim. Instead, Capitol asserts only that uploading to and downloading from the Cloud Locker *incident to sale* fall outside the ambit of fair use. The Court agrees.").

position,¹⁵⁶ its reasons for doing so are questionable and leave room to make a case for ReDigi 2.0.

In *ReDigi*, the court cited *Arista Records, LLC v. Doe 3*¹⁵⁷ in justifying the prohibition against uploading or downloading incident to sale.¹⁵⁸ That case, however, makes no mention of the “incident to sale” language, but rather points to *Harper & Row Publishers, Inc. v. Nation Enterprises*,¹⁵⁹ and concludes that “[f]air use presupposes good faith and fair dealing,” and one pertinent consideration is “whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”¹⁶⁰ The court’s manufacture of an “incident to sale” rule based on this language is problematic at best, and contradicts established law at worst.

Despite the fact that ReDigi 2.0 users would be downloading copies incident to sale, they would likely satisfy the actual fair use language used in *Arista Records* and *Harper & Row*. Users who chose to sell their music would not be exploiting the material, because they would have already paid the customary price upon first sale. Any future monetary gain by the consumer, or a percentage retained by ReDigi, would be covered by the first sale doctrine. Drawing an analogy to CDs is instructive of the problem with the court’s interpretation of fair use.¹⁶¹ Under the court’s “incident to sale” analysis, a user could not rip a copy of a CD to a computer or mobile device that the user later planned to sell. But that would fly in the face of the ruling in *Diamond*, which held that an owner ripping music is a “paradigmatic noncommercial personal use.”¹⁶²

The legality of this type of fair use presupposes that ReDigi 2.0 users will delete the copies they have created upon download once they sell the original stored in the cloud. Capitol likely has serious

¹⁵⁶ *Id.*

¹⁵⁷ 604 F.3d 110 (2d Cir. 2010).

¹⁵⁸ *See ReDigi*, 943 F. Supp. 2d at 653.

¹⁵⁹ 471 U.S. 539 (1985).

¹⁶⁰ *Arista Records*, 604 F.3d at 124 (quoting *Harper & Row*, 471 U.S. at 562).

¹⁶¹ *See ReDigi*, 934 F. Supp. 2d at 652–54.

¹⁶² *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999); *see supra* Part II.C.

doubts as to whether that deletion actually takes place. Yet *Sony* established that just because a piece of technology has the ability to facilitate infringing activity, it does not make the company that created the technology liable for infringement.¹⁶³ *Diamond* reaffirmed this concept. Just because users had the ability to rip copies of CDs to their mobile device, and then resell the CD without deleting those copies, did not make the manufacturer of the mobile device liable for that infringing activity.¹⁶⁴ *Cartoon Network* also demonstrated that this same concept can be applied to cloud service providers, and that just because customers can utilize the equipment to infringe, does not create liability on the part of the service provider itself.¹⁶⁵

C. *ReDigi's Impact on Efforts by Apple, Amazon, and Murfie to Preserve the First Sale Doctrine*

1. *Apple*

The big winner in *ReDigi* may actually turn out to be Apple, which is poised to initiate its own version of resale of digital content in the cloud based on the first sale doctrine. *ReDigi* has expended a great deal of money on legal costs and may wind up bankrupt as a result of attorney fees and damages awarded in the case.¹⁶⁶ Meanwhile, Apple will get the benefit of the court's ruling and can craft its own business model accordingly. Indeed, iTunes's success as a legal source for downloading music was built upon the

¹⁶³ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430–56 (1984).

¹⁶⁴ See *Diamond*, 180 F.3d at 1074–75, 1079.

¹⁶⁵ See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 130–33 (2d Cir. 2008).

¹⁶⁶ See Lee Gesmer, *Federal Judge Tells ReDigi to Shut It Down*, MASSLAWBLOG (Apr. 2, 2013), <http://masslawblog.com/uncategorized/federal-judge-tells-redigi-to-shut-it-down/> (“[U]nless an injunction is issued (the court’s opinion was not accompanied by an injunction), any appeal may have to await final judgment, which will include [sic] damages (and potentially Capitol’s attorney’s fees). However, *ReDigi* will not be permitted to initiate an appeal unless it firsts [sic] posts a bond in the amount of the judgment. Typically, a small start-up like *ReDigi* can obtain a bond only by providing the bonding company a cash amount equal to the bond. It seems unlikely that *ReDigi* has sufficient assets to afford a bond to cover a large judgment.”).

backs of companies like Napster and Grokster that drowned while testing the legal waters.

As outlined above, the *ReDigi* ruling does nothing to discredit the legal underpinnings of the basic ReDigi 2.0 model, and Apple has no doubt realized that it has the money and name recognition to subsume ReDigi's position in the market. Apple already facilitates direct sales of digital music through iTunes to its own cloud.¹⁶⁷ The next step is simply to set up a system whereby title to the licenses to that content can be transferred between users. Indeed, Apple already has a patent application that covers precisely that.¹⁶⁸ Apple's patent application contemplates much more than license transfer in the cloud. Its patent application describes the buying and selling of previously owned digital music, not just through Apple's cloud, but directly from user to user.¹⁶⁹

In 2010, The Institute of Electrical and Electronic Engineers ("IEEE") formed a working group to try to develop a standard for what it called Digital Personal Property ("DPP"), which was, in essence, the transfer of files similar to the user-to-user transfer that Apple's patent application describes.¹⁷⁰ The goal was to make digital content more like physical media in order to encourage

¹⁶⁷ *Apple iCloud*, APPLE, <http://www.apple.com/icloud/features/> (last visited Apr. 14, 2013).

¹⁶⁸ U.S. Patent Application Pub. No. 20130060616, at [0007] (filed June 22, 2012) ("Techniques are provided for allowing authorized access to (or ownership of) a digital content item to be transferred from one user to another. A first user purchases a digital content item, such as a digital book, from an online store. The first user later decides to sell the digital content item to a second user. The first user and/or the second user notify the online store of this arrangement. The online store determines whether one or more criteria are satisfied in order to allow the transfer in ownership to take place. If the one or more criteria are satisfied, then the online store stores data that reflects the transaction and updates authorization data that authorizes the second user to access the digital content item and prevents the first user from accessing the digital content item.").

¹⁶⁹ *See id.*

¹⁷⁰ Bill Rosenblatt, *New IEEE Standards Initiative Aims at "Digital Personal Property,"* COPYRIGHT AND TECHNOLOGY (July 2, 2010), <http://copyrightandtechnology.com/2010/07/02/1054/>.

transferability, while preventing the wholesale copyright infringement endemic during the Napster years.¹⁷¹

Conceptually, DPP is similar to car ownership.¹⁷² The car owner possesses the physical car, but needs a key to use it. The owner could loan the key to a friend, or even sell the car and give the buyer the keys. DPP would mean that users could purchase music, or any other type of digital content, and would get not just the file, but an encrypted key.¹⁷³ The file could be copied and transferred to friends, but the file would not work without the single encrypted key.¹⁷⁴ The owner could loan that key to a friend, but because there is only one key, if the friend did not give the key back, then the owner could no longer access that file. Similarly, if the owner sold the key to someone else, it would effectively transfer ownership to the other person. Even if the owner still had the music file, it would not work without the key. For this scheme to work, the DPP software would only allow one key to exist per file.

Apple's application, in part, seeks to patent the technology that would allow users to exchange DPP.¹⁷⁵ The problem is that exchanging music files using DPP would involve making copies in order to transfer the music files from one user to another. This would inevitably run afoul of the prohibitions articulated in *ReDigi*

¹⁷¹ See *id.*

¹⁷² See Nate Anderson, *Goodbye, DRM; hello "stealable" Digital Personal Property*, ARS TECHNICA (Sept. 7, 2009, 9:00 PM), <http://arstechnica.com/tech-policy/2009/09/goodbye-drm-hello-stealable-digital-personal-property/>.

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ U.S. Patent Application Pub. No. 20130060616 (filed June 22, 2012), available at <http://appft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PG01&p=1&u=%2Fmetahtml%2FPTO%2Fsrchnum.html&r=1&f=G&l=50&s1=%2220130060616%22.PGNR.&OS=DN/20130060616&RS=DN/20130060616>; see also Jacqui Cheng, *Apple follows Amazon with patent for resale of e-books, music*, ARS TECHNICA (Mar. 8, 2013, 12:55 PM), <http://arstechnica.com/apple/2013/03/apple-follows-amazon-with-patent-for-resale-of-e-books-music/> (explaining that Apple's technology "would include embedded user information as part of the DRM of each file. When the file is given or resold to another user, the ownership of the data would change and the original purchaser would no longer be able to access the file").

against fixing a copyrighted work (the music file) in a new material object (the new user's device).¹⁷⁶ While users would undoubtedly prefer to keep their music files resident on their own devices, Apple could get around the court's ruling by simply storing the original file in the cloud and allowing users to exchange the key. This would bypass the *ReDigi* ruling because users would not be exchanging the copyrighted content, but rather the access key to that content. Apple could simply become an intermediary for the sale of digital keys to a wealth of original recordings living in the cloud. While users might balk at the notion of having their files restricted to the cloud, that resistance might lessen as the ease of accessing the cloud grows.

One might ask why Apple would want to facilitate the resale of music at all, given that the lower prices could siphon off revenue from original sales through iTunes. At least one observer theorizes that Apple may be more interested in selling its devices than in selling music itself, and that encouraging resale simply increases demand and use of its devices.¹⁷⁷ The company may also see this as a sacrifice worth making in order to lure consumers into committing to using the Apple cloud as opposed to Amazon's, particularly given the possibility of more lucrative sales of e-books, games, and movies. Apple may also simply recognize that unless users receive some value by owning music, they may abandon purchasing through iTunes in favor of subscription services, or resort to free access through YouTube or Grooveshark.

2. Amazon

Amazon's patent, issued in January 2013,¹⁷⁸ differs from Apple's patent application in important ways. While Apple's patent application contemplates DPP, allowing users to conduct sales independently of Apple's cloud, Amazon envisions a marketplace

¹⁷⁶ See *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 648–51 (S.D.N.Y. 2013).

¹⁷⁷ See *Comparing Apples*, *supra* note 70.

¹⁷⁸ U.S. Patent No. 8,364,595 (filed May 5, 2009), available at <http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=/netahtml/PTO/srchnum.htm&r=1&f=G&l=50&s1=8,364,595.PN.&OS=PN/8,364,595&RS=PN/8,364,595>.

contained entirely within its cloud.¹⁷⁹ Users could buy and sell what Amazon refers to as “digital objects.”¹⁸⁰ Such objects would be “stored” or saved in one user’s digital locker, then transferred to another user’s digital locker upon sale.¹⁸¹

Amazon could follow Apple and pursue a ReDigi 2.0 type model: keeping music files in one location and transferring the license, all under the first sale doctrine. Significantly though, Amazon’s patent clearly describes a copy and delete method of transfer.¹⁸² This would certainly violate the rule articulated in *ReDigi* that a copy of a file cannot be sold and that transfer of a file from one hard drive to another necessarily involves copying.¹⁸³ As with Apple, Amazon can always look to a renegotiated licensing agreement, or Congress, to remove this roadblock. All of this presupposes that Amazon is both willing and capable of changing its current terms of use, which expressly forbid the sale or transfer of ownership or license.¹⁸⁴

¹⁷⁹ See *id.*

¹⁸⁰ *Id.* at claim 1.

¹⁸¹ *Id.*

¹⁸² *Id.* The patent abstract explains that “[w]hen the user no longer desires to retain the right to access the now-used digital content, the user may move the used digital content to another user’s personalized data store when permissible and the used digital content is deleted from the originating user’s personalized data store.” *Id.* at [57].

¹⁸³ See *supra* Part III.B.1.

¹⁸⁴ Amazon’s licensing agreement requires users, in part, to agree to the following terms:

You must comply with all applicable copyright and other laws in your use of the Music Content. Except as set forth in Section 2.1 above, you may not redistribute, transmit, assign, sell, broadcast, rent, share, lend, modify, adapt, edit, license or otherwise transfer or use the Music Content. We do not grant you any synchronization, public performance, promotional use, commercial sale, resale, reproduction or distribution rights for the Music Content. As required by our Music Content providers, Music Content is available only to customers located in the United States.

Amazon MP3 Store: Terms of Use, AMAZON, <http://www.amazon.com/gp/help/customer/display.html?nodeId=200154280> (last visited Jan. 27, 2014).

3. *Murfie Music*

Murfie, although much smaller than Amazon and Apple, is also attempting to utilize the first sale doctrine to enable its users to resell digital music.¹⁸⁵ It stores, streams, and facilitates sales of digital music owned by its users.¹⁸⁶ Murfie's users ship music CDs they own directly to the company.¹⁸⁷ Murfie, acting as the customer's agent for the purposes of fair use, then rips the CDs into digital music files which it stores on its servers, and places the CDs into physical storage set aside for each user.¹⁸⁸ Users can then stream the music directly from the cloud provided by Murfie.¹⁸⁹ They can also sell or trade that music to other users through Murfie's website.¹⁹⁰

Once the file resides on the server, Murfie facilitates sales in the same manner as ReDigi, by transferring title rather than transferring a copy.¹⁹¹ In the case of Murfie, users purchase not only access to the file, but the rights to the physical CD as well.¹⁹² The CD remains in Murfie's warehouse, unless the new user requests its delivery, and the single music file remains on its servers.¹⁹³ Unlike ReDigi though, Murfie does not allow sale of music that has already been downloaded from their cloud by a user.¹⁹⁴ This prohibition avoids the potential claim by copyright

¹⁸⁵ See Ashley Dinauer, *Music Tastes Change: So Don't Forget about the Ace up your Sleeve*, MURFIE BLOG (Oct. 8, 2011), <http://blog.murfie.com/2011/10/08/music-tastes-change/>.

¹⁸⁶ See MURFIE, <https://www.murfie.com> (last visited Jan. 27, 2014).

¹⁸⁷ *Terms of Use*, MURFIE, <https://www.murfie.com/terms> (last visited Jan. 27, 2014).

¹⁸⁸ As of November 2012, Murfie had received over a quarter million CDs from its customers. *Murfie Partners with Sonos to Offer Wireless Streaming of Physical Music Collections*, REUTERS (Nov. 13, 2012, 7:00 AM), <http://www.reuters.com/article/2012/11/13/idUS117112+13-Nov-2012+PRN20121113>.

¹⁸⁹ *Terms of Use*, MURFIE, <https://www.murfie.com/terms> (last visited Mar. 18, 2013).

¹⁹⁰ *Id.*

¹⁹¹ *See id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* (Restrictions to Selling and Trading).

holders that users could download a copy and sell the one held by Murfie.

Still, the court in *ReDigi* held that *any* copies made incident to sale are infringing.¹⁹⁵ To remain legal under *ReDigi*, Murfie would have to delete any copies ripped to the cloud on behalf of the original owner, and then rip a new copy once the transfer of the original CD was effectuated. This labor-intensive practice would likely be an untenable business model for Murfie. For Murfie, as well as Apple, Amazon, and ReDigi 2.0, the only legal path at this point is to restrict sales and use to the cloud, a solution that is not as attractive to users who still want content on their mobile devices. The preferable long-term solution is for copyright holders to embrace a digital “first sale” doctrine.

D. *Why Copyright Holders Should Support a Digital First Sale Doctrine*

ReDigi, Apple, Amazon, and Murfie are all trying to provide a legal mechanism for the resale of digital content and it is in the best interest of Capitol and other copyright holders to support, rather than resist, these efforts. If copyright holders do not provide a legal mechanism for transfer and ownership, the danger is that users will simply revert to the days of Napster and piracy. As ReDigi’s CEO put it, “attempting to deny people their intrinsic and lawful ownership rights to their digital property will only further perpetuate piracy. If the labels do not think music has ongoing value, why should consumers?”¹⁹⁶ Indeed, the success of iTunes itself demonstrates that users will turn to a legal means of accessing content if one is made available.

One might ask why ReDigi, Apple, or Amazon would even bother trying to facilitate the sale of used digital music in the first place, given that the average price of each used song on ReDigi’s website is fifty-nine to seventy-nine cents, of which ReDigi retains

¹⁹⁵ *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 656 (S.D.N.Y. 2013).

¹⁹⁶ Thomas Claburn, *Google: Digital Music Case has Cloud Law Implications*, INFORMATIONWEEK (Feb. 3, 2012), <http://www.informationweek.com/cloud-computing/platform/google-digital-music-case-has-cloud-law/232600171>.

only 60%.¹⁹⁷ But music is just the start: ReDigi is already working on expanding into the sale of used e-books,¹⁹⁸ which carry a much greater resale value.¹⁹⁹ With e-books, movies, and video games making their way to the cloud, one can easily see the financial gain to be made.²⁰⁰ If copyright holders embrace a digital first sale doctrine, they could reap some of that monetary reward; ReDigi's service already sets aside 20% of each sale for the artist.²⁰¹ Apple's patent application,²⁰² as well as Amazon's patent,²⁰³ also contemplates making royalty payments to copyright holders for the resale of digital content. Whether 20% is a fair amount is certainly debatable, but it's a debate that copyright holders cannot be a part of until they stop resisting a digital first sale doctrine. The current first sale doctrine does not require monetary compensation to artists, thus the willingness of ReDigi, Apple, and Amazon to

¹⁹⁷ *ReDigi*, 934 F. Supp. 2d at 660.

¹⁹⁸ Judith Rosen, *ReDigi Plans to Sell Used E-books*, PUBLISHERS WEEKLY (July 27, 2012), <http://www.publishersweekly.com/pw/by-topic/digital/retailing/article/53334-redigi-plans-to-sell-used-e-books.html>.

¹⁹⁹ The average cost of a best-selling e-book in May of 2013 was just under \$7.00. Jeremy Greenfield, *Top-25 Best Selling Ebooks: Average Price for Ebook Best-Seller Dips Below \$7.00*, DIGITAL BOOK WORLD (May 28, 2013), <http://www.digitalbookworld.com/2013/top-25-best-selling-ebooks-average-price-for-ebook-best-seller-dips-below-7-00-again/>.

²⁰⁰ Prices for downloads of new releases on Apple iTunes typically run between fifteen to twenty dollars. *See iTunes Charts*, APPLE, <http://www.apple.com/itunes/charts/movies/> (last visited Jan. 7, 2014).

²⁰¹ *ReDigi*, 934 F. Supp. 2d at 646.

²⁰² U.S. Patent No. 20,130,060,616, at [0015]–[0019] (filed June 22, 2012), available at [http://appft1.uspto.gov/netacgi/nph-Parser?Sect1=PTO2&Sect2=HITOFF&u=%2Fmetahtml%2FPTO%2Fsearch-adv.html&r=5&p=1&f=G&l=50&d=PG01&S1=\(apple.AS.+AND+20130307.PD.\)&OS=an/apple+and+pd/3/7/2013&RS=\(AN/apple+AND+PD/20130307\)](http://appft1.uspto.gov/netacgi/nph-Parser?Sect1=PTO2&Sect2=HITOFF&u=%2Fmetahtml%2FPTO%2Fsearch-adv.html&r=5&p=1&f=G&l=50&d=PG01&S1=(apple.AS.+AND+20130307.PD.)&OS=an/apple+and+pd/3/7/2013&RS=(AN/apple+AND+PD/20130307)) (explaining that “[a] portion of the proceeds of the ‘resale’ may be paid to the creator of the digital content item, to one or more of: the publisher of the digital content item, the entity that originally sold the digital content item to the transferor, an entity that allows the transfer in ownership, and the transferor.”).

²⁰³ U.S. Patent No. 8,264,595 (filed May 5, 2009), available at <http://patft.uspto.gov/netacgi/nph-Parser?Sect1=PTO1&Sect2=HITOFF&d=PALL&p=1&u=/metahtml/PTO/srchnum.htm&r=1&f=G&l=50&s1=8,364,595.PN.&OS=PN/8,364,595&RS=PN/8,364,595> (discussing the levying of a fee that would cover “the owner of the digital object receiving a royalty, etc.”).

include artists in revenue sharing shows at least some amount of pragmatism, if not outright good faith.

Likewise, while copyright holders may object to a digital first sale doctrine because digital files do not degrade over time in the same manner that books, records, and CDs do, there are ways to address those concerns while still allowing for resale. Amazon's patent, for instance, contemplates a kind of digital degradation, where files can only be transferred a limited number of times.²⁰⁴ The value of the digital content would diminish just as physical content does. The value of a music file that could no longer be transferred would be practically zero, while the value of a file that could still be transferred ten more times would be worth more. Similarly, Apple's patent application envisions that copyright holders could embed into their digital content a waiting period for the amount of time required between transfers, and a minimum price for transfers, in order to prevent rapid purchasing, illegal copying, and subsequent reselling of digital content.²⁰⁵ The optimal price, waiting period, and number of transfers is again debatable, but it is a debate the copyright holders must be a part of if they, and resellers, are to thrive.

Copyright holders themselves may find it more valuable to take a percentage of resale revenue rather than license to companies that stream music. Even if subscription services like Spotify or Rhapsody are paying royalties, it may not be enough to compensate

²⁰⁴ *Id.* (explaining that “[t]hresholds may be set which limit transfer of a used digital object after the occurrence of certain events.) For example, a threshold may limit how many times a used digital object may be permissibly moved to another personalized data store, how many downloads (if any) may occur before transfer is restricted, etc. *Id.* These thresholds help to maintain scarcity of digital objects in the marketplace and/or to comply with licensing requirements of the digital object, by putting conditions on when and how many times used digital objects may be transferred.” *Id.*

²⁰⁵ Mikey Campbell, *Apple's Digital Content Resale and Loan System could Allow DRM Transfers between End Users*, APPLEINSIDER (Mar. 7, 2012, 2:00 AM), <http://appleinsider.com/articles/13/03/07/apples-digital-content-resale-and-loan-system-could-allow-drm-transfers-between-end-users>.

the musicians and other creators of content.²⁰⁶ An even worse alternative for copyright holders is Grooveshark, which has built its entire business model on the idea that music can be shared for free.²⁰⁷

Grooveshark is “one of the largest on-demand music services on the Internet.”²⁰⁸ It allows users to upload *any* music file, regardless of its origin, to Grooveshark’s servers and then allows *any* of its users to access and stream *any* other user’s music files.²⁰⁹ In essence, it creates music lockers for its users but provides no locks to prevent its estimated 20 million monthly users from accessing them.²¹⁰ While ReDigi and the others are trying to emphasize the singularity of music files in order to maintain a concept of ownership, Grooveshark is doing the opposite. It is promoting the idea that music should be freely shared by all, ignoring the fact that this notion flies in the face of established copyright law. As a result, Grooveshark has been the target of multiple lawsuits by the music industry.²¹¹ EMI, a music company that by Grooveshark’s estimation owns “about 26 percent of the music that’s out there,” initially settled with Grooveshark in favor of a licensing agreement.²¹² That deal has led to a second lawsuit

²⁰⁶ Don Reisinger, *Surprise! Artists make pittance on streaming services*, CNET (Sept. 4, 2012, 7:37 AM), http://news.cnet.com/8301-1023_3-57505520-93/surprise-artists-make-pittance-on-streaming-services/.

²⁰⁷ Stephanie Mlot, *Grooveshark Embraces HTML5 Amidst (another) EMI Lawsuit*, PCMAG (Sept. 6, 2012, 11:23 AM), <http://www.pcmag.com/article2/0,2817,2409345,00.asp>.

²⁰⁸ *About Grooveshark*, GROOVESHARK, <http://grooveshark.com/#!/about> (last visited Aug. 25, 2013).

²⁰⁹ *See Legal/Overview*, GROOVESHARK, <http://grooveshark.com/#!/legal> (last visited Aug. 25, 2013).

²¹⁰ *Id.*

²¹¹ Olivia Solon, *Grooveshark sued by all four major record labels*, WIRED.CO.UK (Jan. 9, 2012), <http://www.wired.co.uk/news/archive/2012-01/09/grooveshark-sued-by-music-labels>.

²¹² Eliot Van Buskirk, *EMI Drops Suit Against Grooveshark Music Service, Licenses it Instead*, WIRED (Oct. 13, 2009, 12:00 PM), <http://www.wired.com/business/2009/10/emi-drops-suit-against-grooveshark-music-service-licenses-it-instead/>.

though, with EMI now claiming that Groovespark has failed to pay royalties on the licenses it acquired.²¹³

Perhaps equally ominous for consumers is that Groovespark's business model is apparently predicated on data mining.²¹⁴ This presents consumers with a Faustian bargain of trading privacy for access to "free" music. Thus, promotion of a first sale doctrine is in the interest of both the recording industry *and* consumers, two groups that have not always been on the same side of issues.

Ultimately, either Congress or the Copyright Office itself could resolve the fight over a digital first sale doctrine. While some observers are pessimistic about the chances of Congress making substantial changes to the Copyright Act,²¹⁵ the Register of the Copyright Office has exhorted Congress to "think big" and create "the next great copyright act."²¹⁶ In doing so, the Register pointed to the possibility of creating a digital first sale doctrine because "Congress may not want a copyright law where everything is licensed and nothing is owned."²¹⁷ If Congress is unwilling or unable to act, then perhaps it should cede that power to the Copyright Office itself. It has done so in the past,²¹⁸ and the Copyright Office might be in a position to bring all the stakeholders to the table to work out changes that all sides can live

²¹³ Mlot, *supra* note 207.

²¹⁴ Greg Sandoval, *Groovespark email: How we build a music service without, um, paying for music*, CNET (Nov. 28, 2011, 11:03 AM), http://news.cnet.com/8301-31001_3-57332246-261/groovespark-email-how-we-built-a-music-service-without-um-paying-for-music/ (discussing an email from Groovespark's chairman outlining the company's plans to sell data mined by Groovespark to copyright holders).

²¹⁵ Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 556 (2007).

²¹⁶ Maria Pallante, Register of the Copyright Office, *The Next Great Copyright Act*, Twenty-Sixth Horace S. Manges Lecture (Mar. 4, 2013), in 1 LINDEY ON ENTERTAINMENT, PUBL. & THE ARTS § 1:118 (3d ed.).

²¹⁷ *Id.*

²¹⁸ See, e.g., Rob LeFebvre, *New Ruling Continues to Let You Legally Jailbreak Your iPhone, But Not Your iPad*, CULTOFMAC (Oct. 25, 2012, 9:24 PM), <http://www.cultofmac.com/198298/new-copyright-office-ruling-allows-you-to-legally-jailbreak-your-iphone-but-not-your-ipad/> (explaining that the Copyright Office has been given the power to review the DMCA and make temporary changes to it).

with. Changing the Copyright Act to create a digital first sale doctrine, with input from retailers like ReDigi, copyright holders like Capitol, and consumers makes sense and would protect the interests of each of those groups. The result would strike a balance between the concerns of copyright holders about the eternal lifespan and falling prices of digital content, the interest of consumers in realizing the value of their purchase, and the interest of retailers in building a system that is less onerous and more profitable.

Action by Congress or the Copyright Office would be far more productive, far less expensive, and far more inclusive of all the parties concerned, than battling it out in the courts. Indeed, there was a great deal of legal maneuvering by Google to try to intervene in the ReDigi case in order to protect its own perceived interests.²¹⁹ The appointment of ReDigi's CEO to the Congressional Internet Caucus Advisory Committee ("CICAC") and the subsequent invitation to him to be part of the First Sale Doctrine panel at the 9th annual CICAC "State of The Net" conference is a positive step towards Congressional action, but that step must be followed by action.²²⁰ As Judge Sullivan noted in *ReDigi*, while the physical limitations of the Copyright Act may have been desirable in the past, "[i]t is left to Congress, and not this Court, to deem them outmoded."²²¹

²¹⁹ Amicus Denial, *Capitol Records, LLC v. ReDigi Inc.*, No. 1:12-cv-00095-RJS, filing No. 24 (S.D.N.Y. Feb. 1, 2012), available at <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2012cv00095/390216/24/> (denying Google Inc.'s request to file an amicus curiae brief "in order to highlight the importance of the copyright law questions Plaintiffs pending preliminary injunction motion raises").

²²⁰ Jaclyn Inglis, *ReDigi(TM) Founder, John Ossenmacher Appointed to Congressional Internet Caucus Advisory Committee (CICAC), and Will Serve as Panelist at 9th Annual "State of The Net" Conference in Washington, D.C.*, WALL ST. J. (Jan. 15, 2013, 9:15 AM), <http://online.wsj.com/article/PR-CO-20130115-906742.html?mod=crnews>.

²²¹ *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 656 (S.D.N.Y. 2013).

V. CONCLUSION

The Copyright Act was written at a time when most copyrighted material had physicality. Now, in the twenty-first century, much of copyrighted material hides invisibly within our computers and mobile devices. The current challenge involves developing methods for treating this ephemeral content as physical. ReDigi, Apple, Amazon, and Murfie have all developed models that promote ownership and a digital first sale doctrine. The ruling in *ReDigi* helps those business models by leaving open the possibility for cloud based sales, but hurts consumers by essentially forcing them to keep their digital content permanently locked in the cloud. The solution to these problems is for copyright holders, retailers, and consumers to join forces to negotiate an equitable solution, either through licensing agreements or congressional action. It is in the best interest of copyright holders to embrace the ideas for the resale of digital music, as well as e-books, movies, and videogames, embodied not only in the business models of ReDigi and Murfie, but in Amazon's patent and Apple's patent application. The alternative is to continue to limp along with the uncertainty of legal battles, along with streaming services like Grooveshark, that are not only detrimental to copyright holders, but also to the idea of private ownership itself.

